SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 406

ANTHONY CRAMER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

BRIEF FOR PETITIONER.

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On Counsel.

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I.

The Opinion of the Court Below.

On December 2nd, 1942, a judgment was entered upon the verdict of the jury in the United States District Court for the Southern District of New York convicting petitioner of the crime of treason under the following statute:

"*Treason.* Whoever, owing allegiance to the United States, levies war against them or adheres to their

enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason." (35 *Stat.* 1088, 18 *U. S. C.* § 1).

The petitioner was sentenced to forty-five years in prison and a $10,000 fine (R. 453).

An appeal from the judgment was taken to the Circuit Court of Appeals for the Second Circuit which affirmed the judgment of the District Court on September 7th, 1943 (R. 475-488). The opinion of the Circuit Court appears at 137 F. (2d) 888.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code as amended by the Act of February 13, 1925, 28 *U. S. C.* § 347-a. Petition for writ of certiorari was filed on September 30, 1943 and was granted on November 8th, 1943. The present proceedings are *in forma pauperis* pursuant to order of this Court, also made on November 8, 1943, the undersigned having been assigned by Hon. John C. Knox, D. J., as counsel to defend.

III.

Statement of the Case.

This case is a sequel to the arrest, and to the trial and conviction before a Military Court in Washington, of the eight German saboteurs who were landed from submarines at two different points on the eastern shore of the United States in the month of June, 1942. These eight saboteurs made their entry into this country in two groups, consisting of four men in each group. The proof showed that of the four men who landed at Ponte Vedra Beach near Jacksonville, Florida, the petitioner had contact with two, namely, Werner Thiel and Edward John Kerling.

In substance, the indictment alleges that Werner Thiel and Edward John Kerling were enemies of the United States who came to this country for the purpose of committing various acts of sabotage, including the destruction of war materials and utilities, the recruiting of persons to assist them in their hostile enterprises, the securing of information concerning the defense of the United States, the making and spreading of false reports within the United States, etc.

It is further alleged that the petitioner Anthony Cramer, being a citizen of the United States and owing allegiance thereto, traitorously and treasonably adhered to Thiel and Kerling in aiding and advising them; in receiving and safeguarding property of Thiel; in carrying out requests and instructions of Thiel to establish contact and communication with others; in giving agents of the United States false information concerning the said Thiel with intent to conceal his identity and his purpose, etc.

Although the indictment charged the commission of ten overt acts we shall, in the interests of brevity, summarize only those three submitted to the jury, namely, Nos. 1, 2 and 10. We omit the recital (common to all) "for the purpose of giving and with intent to give aid and comfort to said enemies".

1. That on June 23rd, 1942, the petitioner met with Thiel and Kerling at the Twin Oaks Inn at Lexington Avenue and 44th Street, in the City of New York, "and did confer, treat and counsel" with the said Thiel and Kerling for a period of time.

2. That on June 23rd, 1942 the petitioner "did accompany, confer, treat and counsel" with Thiel for a period of time at the Twin Oaks Inn at Lexington Avenue and 44th Street and at Thompson's Cafeteria on 42nd Street, both in the City of New York.

10. That on June 27th, 1942, the petitioner gave false information and made false statements regarding Werner Thiel to Special Agents Willis and Ostholthoff of the Federal Bureau of Investigation as follows: (1) that Werner Thiel's name was Bill Thomas; (2) that from March, 1941, until June, 1942, Thiel had been working in a factory on the west coast of the United States; (3) that during the aforesaid period Werner Thiel had not been out of the United States; (4) that the money belt given him by Werner Thiel in June, 1942 had contained only a couple of hundred dollars which Werner Thiel had owed him; and (5) that the $3,500 in the petitioner's safe deposit box at the Corn Exchange Bank, on East 86th Street, belonged to him and had been obtained by him from the sale of securities because he considered it safer there than in his savings account in said bank; that the foregoing false information was given for the purpose of concealing the identity and mission of the said Werner Thiel.

The full statement of the evidence contained in the opinion of Clark, C. J., makes it unnecessary to repeat the facts and circumstances.

The issues of law revolved about the proof relative to the overt acts, to which we shall presently advert. The factual issue was clean-cut and substantial. There was no dispute that the petitioner actually, in the sense of physically, performed the acts alleged in the indictment. In other words, the petitioner did talk with Thiel and Kerling, he did take the money belt containing $3,500 from Thiel, he did place the greater part of this money in his safe deposit box, he did write a letter to Norma Kopp and so forth. And his counsel so conceded in his opening to the jury (R. 18).

The crucial issue was whether, in performing these acts, the petitioner entertained that traitorous intent which is

indispensable to the establishment of the crime. Upon the basis of the entire record, it can be confidently asserted that this question of the petitioner's intent remained close throughout the trial. In imposing sentence upon the petitioner, the District Judge made the following significant comment (R. 453):

> "From the evidence it appears that Cramer had no more guilty knowledge of any subversive purposes on the part of Thiel or Kerling than a vague idea that they came here for the purpose of organizing pro-German propaganda and agitation. If there were any proof that they had confided in him what their real purposes were, or that he knew or believed what they really were, I should not hesitate to impose the death penalty."

In this state of the evidence it is claimed that the alleged errors in matters of proof were highly prejudicial.

The United States Attorney expressly disclaimed any prearrangement between petitioner and the eight saboteurs but stated flatly that the latter came to this country "without prior notification and without prearrangement of any kind or character" (R. 10), a position which was reiterated later on in the trial to the effect "so far as we know there was no prearrangement or prior notification with respect to Thiel being aided and comforted by the defendant Cramer" (R. 115).

With reference to the overt acts, there was tried shortly after the trial of this case a charge of treason against one Leiner before Clancy, D. J., also in the United States District Court for the Southern District of New York. The situation relative to the overt acts was substantially identical. In the *Leiner* case Judge Clancy directed a verdict for the defendant at the close of the entire case and his opinion, orally rendered, in connection with the granting of that motion is set forth as an Appendix to this brief.

IV.

Specification of Errors

The United States Circuit Court of Appeals erred in affirming the judgment of the District Court for the following reasons:

1. Petitioner was denied a fair trial in consequence of grave and prejudicial errors committed by the District Court in receiving numerous items of improper evidence.

2. The District Court erred in submitting to the jury Overt Acts 1, 2 and 10 on the ground that such acts were legally insufficient in that they did not openly manifest treason.

3. Overt Act 10 should not have been submitted to the jury for the additional reason that petitioner's statements, which form the substance of that act, were made by him subsequent to the time he was taken into custody but prior to the time of his arraignment.

4. (A) The Court below erred in submitting to the jury Overt Acts 2 and 10 on the further ground that the allegations thereof had not been proved by the testimony of two witnesses; (B) And the court erred in charging the jury with respect to the requirement of proof by two witnesses to each overt act.

5. The evidence as a whole failed to make out a case against petitioner and the motion for the direction of a verdict in his favor should have been granted.

V.

ARGUMENT.

First Point.

Petitioner was denied a fair trial in consequence of the grave, and prejudicial errors committed by the District Court in receiving numerous items of improper evidence.

Intent was the issue. It was close. The petitioner had no previous record of disloyal acts or utterances. Knowledge, as a fact, and as distinguished from mere inference was predicated entirely upon two alleged admissions attributed to the petitioner himself.

There were numerous circumstances, both positive and negative, which had to be considered as, for example, the conceded fact that there was no prearrangement between Thiel and petitioner; that petitioner, neither by virtue of the job which he held nor any knowledge which he could have had, was in any position to furnish any information of military value to Thiel and Kerling; that all his talks with Thiel and Kerling, and Thiel alone, took place in public restaurants; that, as bearing upon the taking of the money belt, Thiel did owe petitioner approximately $200; that Norma Kopp was admittedly Thiel's fiancee and no agent of the German Reich; that, unless the placing of the money belt in the shoe box be regarded as a "concealment", nothing whatever was found concealed in petitioner's room when it was searched (R. 100-101); that petitioner agreed freely to the search of his room, his safe deposit box and the taking of his letters; his previous spotless record; and the very evident fact, as shown by his entire conduct after his arrest, that he had no realization that what he had done might have serious consequences.

A.

COPY OF THE UNITED STATES CONSTITUTION.

On November 9th, 1936, petitioner became a citizen of the United States (R. 29; Govt's Exh. 2, R. 29). The oath of allegiance which he then signed contained the usual clauses relative to the Constitution of the United States (R. 250).

Government's Exhibit 55 (R. 309) is a copy of page 21 of the issue of the New York *Times* for Friday, September 17th, 1937. It contains the Constitution of the United States in its entirety. The petitioner could not remember just how it came into his possession but in his talks with the F. B. I. men he fixed the time as some time in the early part of the year 1941 (R. 313, 111). He kept this copy of the Constitution in his room, evidently reading it over from time to time, and he placed a number of ink lines alongside of or under the following provisions of the Constitution:

1. That portion of Article 1, Section 7, which provides that if any bill passed by the Congress shall not be returned by the President within ten days after having been presented to him, the same shall be a law;

2. That portion of Article 1, Section 8, which provides that Congress shall have power to declare war, grant letters of marque and reprisal and make rules concerning captures on land and water;

3. That portion of Article 1, Section 9, which provides that no bill of attainder or ex post facto law should be passed;

4. That portion of Article 1, Section 9, which provides that no title of nobility shall be granted by the United States;

5. That portion of Article II, Section 1, which sets forth the oath which the President shall take before entering upon the execution of his office;

6. Article III, Section 3, which defines treason against the United States, provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act and further provides that Congress shall have power to declare the punishment of treason.

After the trial court had received the exhibit in evidence, petitioner testified that he had no particular reason for marking the paragraph relating to the law of treason and that he had the habit whenever he read something that struck his imagination or curiosity to mark it (R. 314).

When this document was offered in evidence, serious objection was raised, the jury were excused during the colloquy with the Court, and the objections of counsel appear at some length (R. 304-310). The objections stressed the contention that the exhibit was "of absolutely no probative value" on any of the issues (R. 305); and that, even if it might be deemed to have some slight, remote bearing, this was evidence of such a character as naturally to arouse the feelings and emotions of the jury so that it would have upon the jury an effect out of all proportion to its true judicial worth (R. 305-306). When it is realized that the trial was held in the midst of war, when all minds are naturally in a state of excitement and peculiarly susceptible to irrelevant and prejudicial proof, particularly in a case of treason, it is hard to imagine evidence of less real probative value and of greater emotional appeal.

The rule invoked by counsel for the petitioner is stated as follows in Wigmore on *Evidence* (3rd Ed.), § 1904:

> "Circumstantial evidence, concededly relevant, may nevertheless be excluded by reason of the general principle (*ante*, § 1863) that the probative usefulness

> of the evidence is more than counter-balanced by its disadvantageous effects in confusing the issues before the jury, or in creating an undue prejudice in excess of its legitimate probative weight. In either case, its net effect is to divert the jury from a clear study of the exact purport and effect of the evidence, and thus to obscure and suppress the truth rather than to reveal it."

The ink lines on Government's Exhibit 55 were placed alongside of a substantial number of provisions of the Constitution and they were all of that strange, unusual and peculiar character which might well seem curious to a person who had just undertaken the duties of citizenship and who, pursuant to his oath of allegiance, was informing himself further as to the contents of the Constitution.

The ink lines had been placed upon the paper at least ten months before war broke out between this country and Germany and, as previously herein stated, it was conceded by the Government that there was no proof of any prearrangement between Thiel and petitioner (R. 115). This exhibit should have been excluded on the ground of remoteness alone. (*People* v. *Razezicz*, 206 N. Y. 249 (1912); *People* v. *Harris*, 209 N. Y. 70 (1913).)

The ostensible reason for offering this exhibit was to impeach the petitioner's credibility. The supposed foundation was sought to be laid in the following question and answer (R. 304):

> "Q. Isn't it a fact, sir, that at one time you were particularly interested in the law of treason? A. No, sir, I have never been interested in that."

The opinion of Clark, C. J., seems to indicate that the Circuit Court was of the view that the exhibit tended to "impeach appellant's answer". It is respectfully submitted that it does not and that the question thus put

to petitioner was used as a mere device to accomplish by indirection what could not fairly and legally be done directly. It was known by everyone connected with the case that petitioner had admitted and had at no time denied having the paper in his possession and having made the marks upon it. It is to be borne in mind that petitioner did not have a perfect command of English and was frequently confused, particularly by words involving mental operations and characterizations.

B.

THE "WARNING" IN NORBERT'S LETTER.

The following took place on the cross-examination of the petitioner (R. 329-330):

"Q. Now, sir, during the year 1941 didn't you receive letters from your nephew Norbert? A. Yes sir.

Q. Now isn't it the fact, sir, that Norbert's father—that was your brother, wasn't it? A. That is right.

Q. Through Norbert warned you that your letters discussed the United States in such an unfriendly fashion that Norbert's father feared that you would be put on the black list, because according to him the letters went through an American censorship?

Mr. Medina: I object to that question as improper, and that the very wording of the question is such that I move for a mistrial.

The Court: Motion denied.

Mr. Medina: What is your Honor's ruling?

The Court: The motion is denied.

Mr. Medina: Exception. What is your Honor's ruling on my objection?

The Court: Overruled.

Mr. Medina: Exception. These are letters from someone else, and I claim they are not binding upon the defendant. Your Honor realizes that, I take it.

By Mr. Correa:

Q. Do you have the question? A. Yes sir. If there was any purpose behind it, I have been trying to show that we still have freedom of the press and thought in the United States.

Mr. Correa: I move to strike the answer, and ask that the question be read and the witness be directed to answer it responsively.

The Court (To witness): Can't you answer that directly? Answer that question directly.

The Witness: Whether it was hostile or whether it was friendly or——

Mr. Medina: No, the question is whether you got letters which said that.

The Witness: Well, I have received a letter from my nephew Norbert which mentions that, I admit that.

Mr. Medina: I move to strike out the answer upon the grounds on which I objected to the question.

The Court: The motion is denied.

Mr. Medina: Exception."

The error in the foregoing ruling seems too clear to call for any extended argument. The letter to which the question of the District Attorney referred was supposedly written by the petitioner's nephew in Germany. The alleged "warning" was supposed to have emanated from the petitioner's brother and to have been communicated to the petitioner through the letter from the nephew Norbert. The letter, of course, was not in evidence and was not admissible on any theory. The alleged statements of petitioner's brother or the petitioner's nephew were obviously not binding upon the petitioner in any respect.

The vice that lay in the question is patent. It assumed the writing by petitioner of letters "unfriendly" to this country, so "unfriendly" that the petitioner's brother felt compelled to "warn" him that he might be put on the "black list". This was rank assumption. There was no evidence of letters written by the petitioner to his brother

which spoke of the United States in an "unfriendly" fashion. The only letter offered in evidence from petitioner to his brother was Government's Exhibit 69 (R. 118), which was written before the attack on Pearl Harbor and which evidences nothing in the way of an "unfriendly" attitude towards the United States.

In making the assumption that the petitioner had written letters, "unfriendly" to the United States, to his brother, the question objected to went to the very heart of the issue of intent. The assumption in the question was, in effect, a substitution for evidence. The question involved, moreover, elements of pure speculation. What the petitioner's brother might have thought were "unfriendly" sentiments, might not have been "unfriendly" at all. Living under a totalitarian government, the petitioner's brother might well have thought that frank criticism of American political leaders, such as the petitioner voiced, for example, in his letter to Thiel (Govt's Exh. 68, R. 118), might get the petitioner into trouble, not realizing that one of the rights which the petitioner had in this country, as an American citizen, was to do that very thing.

Thus, we say, that there were elements of pure speculation in the question. What the petitioner's brother might have regarded as "unfriendly" sentiments towards the United States was anybody's guess and it is clear that, in no event, was the petitioner bound by any conclusion reached by his brother on that subject.

If is difficult to see how this ruling could have failed to prejudice petitioner. The Circuit Court appears to concede that the ruling was erroneous (R. 488) but refers to the wide discretion relative to cross-examination in general and intimates that the question may have been intended to refresh petitioner's recollection as to whether he had written any letters of a nature unfriendly to the United States. There seems to be no justification in the record for this view.

C.

THE EXCESSIVE MASS OF EVIDENCE TO ESTABLISH THAT THIEL AND KERLING WERE ENEMIES OF THE UNITED STATES.

One of the essential allegations of the indictment, of course, was that Werner Thiel and Edward John Kerling were enemies of the United States who had come into this country to commit various acts hurtful to the war effort of the United States.

With respect to these allegations, counsel for the petitioner in his opening to the jury made the following blanket concession (R. 17):

> "The first one, as Mr. Correa has indicated, is that the Government must show that these persons, Thiel and Kerling, with whom Mr. Cramer is alleged to have had dealings, were really enemy spies here to do the work of the German Government. They must show that, of course. And I say to you gentlemen, and I admit in the most formal way for this record that the defendant admits that that is so. That is not going to be an issue in this case. It is not going to be a real issue now, of course, because the defendant does not concede that he knew that to be so. That is something different. But as far as that fact is concerned of Thiel and Kerling being German spies who came over here to do damage to our country, that is not going to be an issue in this case because that is so. It is admitted to be so."

Elaborating upon this concession, counsel for the petitioner further stated in his opening (R. 18):

> "Furthermore, I believe that if we have a great many witnesses called and a whole lot of exhibits brought in on that particular issue, that are copied from others Cramer had nothing to do with at all, I say that would be prejudicial to him and I intend to object to cumulative evidence of that kind coming in. I want to remove

all issues from the case, as far as I can, because we all know these people really were spies that came here as saboteurs to do sabotage. Now that is that."

Shortly after the opening of the trial, the Government called to the stand Ernest Peter Burger, one of the eight saboteurs who landed from submarines on the shores of this country in June of 1942. Burger was one of the group that landed on the Long Island shore on the night of June 13th, 1942 (R. 42). Burger told the whole story, more than sufficient to establish beyond peradventure of doubt that Werner Thiel and Edward John Kerling were saboteurs and enemies of the United States. He testified to the attendance of all eight saboteurs at a special school for sabotage training in Brandenburg, outside of Berlin (R. 31). He told how they were instructed in the use of chemical combinations, incendiaries and explosives (R. 31). He identified photographs of all eight saboteurs, including Werner Thiel and Edward John Kerling (R. 31-32). He told how they visited certain aluminum plants as part of their training (R. 32). He related how they received their equipment and instructions, including explosives and uniforms (R. 33). He identified a considerable collection of photographs of their equipment, including explosives, time device fuses, detonators, igniters, uniforms, caps, etc. (Govt's Exhs. 11-27 inc., R. 45).

In the course of the testimony of this witness, counsel for the petitioner took occasion to remind the Court that while he did not deny the relevancy of the testimony being offered and did not claim, up to that point, that there had been any undue elaboration, his position, nevertheless, was that he would object to "the repetition, the rubbing of it in, and the elaboration of it, in view of our concession" (R. 38).

Burger continued, identifying the shovels which they were to use in burying the explosives after their arrival on the shores of this country (R. 39). He testified to the num-

ber of boxes of explosives which each group had. He told of their departure by submarine from Lorient on the French coast (R. 40). He testified to their receiving final instructions and money which was given to them in money belts, containing approximately $5,000 each (R. 40-41). Burger identified his money belt, as well as Thiel's and Kerling's money belts (R. 41). He told how he attended at the departure of the group that left for Florida, including Thiel and Kerling (R. 42). He went on to testify as to when his group, the Long Island group, departed, the circumstances of their landing and what they did when they reached the Long Island shore (R. 42). He concluded by telling of his arrest and subsequent trial in Washington (R. 43).

The foregoing, in barest outline, will give the Court an idea of the scope and character of Burger's testimony.

In the course of the testimony of the next witness, Special Agent Parsons of the F. B. I., Government's Exhibits 11 to 27, consisting of photographs of the various equipment to be used by the saboteurs, were offered in evidence (R. 45). At that point counsel for the petitioner renewed his objection as follows (R. 46):

> . . . . specifically upon the ground that in view of the concession made here, and in view of the proof by the witness Burger, which would seem to cover the field thoroughly and comprehensively, we believe that evidence as to such details as appear in these photographs and other similar evidence that may be produced a little later, will have an amount of effect out of all proportion to its true judicial worth and will be prejudicial to the defendant; it will confuse the issues and it will get, inevitably, the minds of the jurors away from what is the central and simple issue, and is bound, particularly when accumulated here, to do so."

The objection of counsel for the petitioner was overruled

and the exhibits received in evidence. Petitioner's exception was noted on the record (R. 47).

Parsons continued with detailed testimony of the chemical and mechanical construction of the various explosive devices (R. 48-52 inc.), counsel for the petitioner being given an objection to "this entire line" of testimony (R. 49).

There followed a succession of witnesses to prove that Thiel and Kerling had stopped at certain hotels in Jacksonville, Florida (R. 61-66 inc.)

The amount of cumulative evidence which may be received in proof of any particular issue is, of course, in the discretion of the trial court. We contend that the learned trial court was guilty of an abuse of discretion in permitting the Government to adduce an excessive amount of evidence to substantiate the allegation that Thiel and Kerling were enemies of the United States. It is true that in order to establish that the petitioner was guilty of treason it was incumbent upon the Government to prove, first, that Thiel and Kerling were enemies of the United States. But the latter, while a basic issue, was likewise a subsidiary issue. The dominant issue was whether the petitioner was a traitor. Counsel for the petitioner, in effect, removed the subsidiary issue from the case by his broad concession in his opening to the jury (R. 17).

While it may be true that the Government was not required to rest entirely upon the concession made by counsel, the Government was not justified in deliberately accumulating evidence to a point where the petitioner became hopelessly submerged in circumstances which, as to him, were wholly unconnected and collateral. The proof as to the nature and extent of the explosives and explosive devices was particularly prejudicial. There was never any showing, or even claim, that the petitioner had anything

to do with these (R. 46). In this connection, we refer to the statement of the trial court in sentencing the petitioner (R. 452-453):

> "It does not appear that this defendant Cramer was aware that Thiel and Kerling were in possession of explosives or other means for destroying factories and property in the United States, or planned to do that."

Second Point

The District Court erred in submitting to the jury Overt Acts 1, 2 and 10 on the ground that such acts were legally insufficient in that they did not openly manifest treason.

I.

This point was argued *in extenso* on the motion by defendant to direct a verdict at the close of the entire case (R. 367-371).

If any one of these overt acts was insufficient to support a conviction, it was reversible error for the Judge to submit it to the jury inasmuch as the jury was not required to find separately as to each. *United States* v. *Cramer*, 137 F. (2d) 888, 893 (C. C. A. 2d, 1943) and cases there cited.

The alleged overt acts submitted to the jury read as follows:

> "1. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did meet with Werner Thiel and Edward John Kerling, enemies of the United States, at the Twin Oaks Inn at Lexington Avenue and 44th Street, in the City and State of New York, and did confer, treat, and counsel with said Werner Thiel and Edward John Kerling for a period of time for the purpose of giving aid with intent to give aid and comfort to said enemies, Werner Thiel and Edward John Kerling.

"2. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did accompany, confer, treat, and counsel with Werner Thiel, an enemy of the United States, for a period of time at the Twin Oaks Inn at Lexington Avenue and 44th Street, and at Thompson's Cafeteria on 42nd Street between Lexington and Vanderbilt Avenues, both in the City and State of New York, for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel.

"10. Anthony Cramer, the defendant herein, on or about June 27, 1943, at the Southern District of New York and within the jurisdiction of this Court, did give false information and make false statements regarding Werner Thiel, an enemy of the United States, to officers and agents of the United States, to wit, John G. Willis and A. E. Ostholthoff, Special Agents of the Federal Bureau of Investigation, Department of Justice, then and there engaged for and on behalf of the United States in investigating said Werner Thiel and his activities in the United States, said false information and false statements being in substance as follows, to wit: (1) That Werner Thiel's name was 'Bill Thomas'; (2) That from March 1941, until June 1942, Werner Thiel had been working in a factory on the West Coast of the United States; (3) That during the aforesaid period, Werner Thiel had not been out of the United States; (4) That the money belt given him by Werner Thiel in June 1942, had contained only a couple of hundred dollars which Werner Thiel had owed him; (5) That $3,500 in his safe deposit box at the Corn Exchange Bank Trust Company, 86th Street Branch, belonged to him and to no one else, had been obtained by him from the sale of his securities, and was kept by him in a safe deposit box because he considered it safer there than in his savings account at said bank; the aforesaid false information and false statements being given and made for the purpose of concealing the identity and mission of said

enemy, Werner Thiel, and for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel."

With respect to the alleged Overt Acts 1 and 2, it is unnecessary for us to consider whether these two overt acts, according to their precise terminology, are legally sufficient. Since there was no proof whatever offered by the Government concerning the subject matter of the conversations had between the petitioner and Thiel and Kerling, and Thiel alone, it necessarily follows that there was no proof of the overt acts in so far as they alleged that the defendant "did treat and counsel" with Thiel and Kerling, and Thiel alone. The furthest that the Government's proof went was to establish that the petitioner "did meet * * * and did confer" so that, for the purpose of testing the sufficiency of these overt acts, as overt acts, they may be treated as alleging simply that the petitioner, on the occasions specified, met and talked with Thiel and Kerling, or Thiel alone.

We contend that, as modified by the proof, Overt Acts 1, 2 and 10 are clearly insufficient as a matter of law in that they do not, as of themselves, and unaided by any other evidence, manifest treason.

The provision in the *Constitution of the United States* concerning treason:

> "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.
>
> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." (Article III, Section 3)

and the statute based thereon (35 Stat. 1088, 18 *U.S.C.* § 1) have their substantive source in the English statute, 25 Edward III [1351] of which Sir Edward Coke wrote, "For except it be Magna Charta, no other act of parliament hath had more honour given unto it by the king, lords spirituall and temporall, and the commons of the realme for the time being in full parliament, then this act concerning treason hath had." (Coke, *The Third Part of the Institutes of the Laws of England*, Cap. I, 1, 2.)

This statute set forth seven types of treason, the most important of which were compassing or imagining the death of the king, queen, or prince, levying war against the king, and adhering to the king's enemies within the land or without. That the treason be manifested by an overt act was required only with respect to the treasons of compassing the death and adhering to enemies, inasmuch as the other treasons (levying war, counterfeiting the king's seal or coin, killing the chancellor, treasurer, etc., violating the king's consort etc.) could be committed only by doing the very act which was the treason.

25 Edward III did not require that the charge of treason be substantiated by two accusers. This was added to the law of England by the statutes 1 Edward VI, c. 12, § 22 [1547] and 5, 6 Edward VI, C. 11, § 9 [1551-1552]. While there was some doubt as to the effect on this requirement of the statute 1, 2, Philip and Mary, C. 10, § 6 [1554], which provided that all trials of treason should be according to the course of the common law, (cf. Wigmore, *Evidence*, 2036), it was finally settled by the statute, 7 William III, § 2, [1695], that no person should be indicted, tried or attainted of high treason except upon the oaths and testimony of two lawful witnesses, unless the party shall willingly, without violence, in open court confess the same, or shall stand mute or refuse to plead, or shall peremptorily challenge above the number of thirty five of the jury. This

statute, however, did not require that there be two witnesses to the same overt act, but only that either both of them testify to the same overt act, or one of them to one, and the other of them to another overt act of the same treason.

It is not to be inferred that 25 Edward III was the only English statute setting forth the substantive law of treason. There were many statutes passed between 1351 and the adoption of our Constitution defining the crime of treason. But 25 Edward III was the cornerstone of the English law of treason and it was that statute which our Constitutional Convention had in mind in defining the law of treason for this country.

The original draft of the Constitution and the Constitution as adopted contained only two of the seven types of treason set forth by 25 Edward III, i. e., levying war and adhering to enemies. Several members of the Convention (Mr. Madison and Mr. Mason) thought the definition of treason too narrow and favored provisions more in conformity with 25 Edward III (cf. Elliott, *Debates on the Adoption of the Federal Constitution*, Vol. V, p. 447), and at the suggestion of Mr. Randolph and Mr. Mason, the phrase "giving them aid and comfort" was inserted after the phrase "adhering to their enemies", to that extent conforming the Constitutional provision to 25 Edward III (Elliott, *supra*, pp. 448, 450).

As for the requirement of proof, the original draft of the Constitution followed the English statute 5, 6, Edward VI in requiring only that no person should be convicted except on the testimony of two witnesses. On Dr. Franklin's motion, however, the phrase "to the same overt act" was inserted after the words "two witnesses", despite the warning of Mr. Wilson that "Treason may sometimes be practiced in such a manner as to render proof extremely difficult, as in traitorous correspondence with an enemy" (Elliott, *supra*, p. 449). Thus on the matter of proof of overt acts the provision of the Constitution departed from

the English law as embodied in 7 William III. But it is abundantly clear, however, that the concept of overt acts of treason set forth in the Constitution was the same concept as had for centuries been part of the law of England.

Thus, at the outset, it is well to bear in mind that throughout the entire history of the law of treason in England the overt act concept was of fundamental and supreme importance; that this English concept of what constituted an overt act was incorporated in our Constitution; and that, in their desire to give more ample protection against the power of government in cases of treason, the founders, in words of unmistakable clarity, deliberately made the law more favorable to the accused by requiring two witnesses "to the same overt act."

We propose to establish that the English authorities uniformly required that the overt act of itself fairly manifest the treason; and that the rule here is and should be the same. If a new rule, requiring merely two witnesses to some insignificant and on its face innocent and harmless circumstance, is formulated, the two witness rule becomes meaningless verbiage and the protection sought to be afforded the accused is mere illusion.

Nothing illustrates this better than the fact that the Circuit Court, by reason of its holding that "the act in and of itself may be innocent", felt obliged to decide that no distinction existed in respect of the legal requirements relative to overt acts between treason and mere conspiracy. Thus we find in the opinion of the Circuit Court (R. 485)

> "We believe in short that no more need be laid for an overt act of treason than for an overt act of conspiracy, which has never been thought of as itself establishing the unlawful scheme."[1]

[1] That the overt act in treason is a substantive part of the crime itself is not open to dispute. The so-called overt acts in conspiracy cases did not exist at common law; they are a purely statutory requirement serving a limited function, in no way comparable to overt acts of treason. It is well established that in conspiracy cases the so-called overt acts form no

The English Authorities.

The English jurists had little difficulty in determining what were sufficient overt acts of treason. Their problem was made easy, first for the reason that there were numerous ways to commit treason in England and many of them required a precise act, such as counterfeiting the king's seal or killing the king's treasurer; second, for the reason that by the time of the printed reports there had grown a wealth of case precedent concerning overt acts of treason; and finally for the reason that eminent and accepted jurists such as Coke, Hale, Blackstone and Foster not only compiled cases concerning treason but wrote of the general principles of this law, basing the principles not only on the decided cases, but as to those questions yet undecided, on their understanding of the evolution of this law and the general requisites of justice.

These jurists had definite ideas of what constituted an overt act of adhering to one's country's enemies; and these acts were none of them innocent of themselves. For example, Foster (*Crown Cases*, [1809 ed.] p. 217), lists fur-

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part of the crime itself. In *United States* v. *Britton*, 108 U. S. 199, 204, 205, 27 L. Ed. 698, 700, 2 S. Ct. 526, 531 (1883) it was held: "• • • This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. • • •". See also *Dealy* v. *United States*, 152 U. S. 539, 38 L. Ed. 545, 14 S. Ct. 680 (1894), *Bannon & Mulkey* v. *United States*, 156 U. S. 464, 39 L. Ed. 494, 15 S. Ct. 467 (1895), *Hyde* v. *Shine*, 199 U. S. 62, 50 L. Ed. 90, 25 S. Ct. 760 (1905), *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 59 L. Ed. 705, 35 S. Ct. 291 (1915), *Marino* v. *United States*, 91 F(2d) 691, 694, 695 (C. C. A. 9th, 1937), *United States* v. *Manton*, 107 F(2d) 834 (C. C. A. 2nd, 1938).

It is a notable circumstance that a so-called overt act necessary for the submission of a conspiracy case to the jury need be the act of but one of the conspirators. (See *Braverman* v. *United States*, 317 U. S. 49, 53, 87 L. Ed. 83, 85, 63 S. Ct. 99, 101 (1942), and cases there cited).

nishing rebels or enemies with money, arms, ammunition, or other necessaries, and sending money, provisions, or intelligence. And Blackstone writes (*Commentaries on the Laws of England*, Bk. IV, Chap. 6, ¶4) "'If a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere he is also declared guilty of high treason.' This must likewise be proved by some overt act, as by giving them intelligence, by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the like."

It is clear that according to the law of England, both prior to and after the adoption of our Constitution, only those overt acts were sufficient which manifested a treasonable intent.

Thus, Lord President Campbell, summing up to the jury in *Rex* v. *Watt*, [1794] 23 How. St. Tr. 1167, at 1388:

> "Gentlemen, to compass the death of the king, if such compassing be manifested[2] by any overt act, is by express terms of the statute itself, high treason; but what is or is not a sufficient overt act, within the intent of the statute, must always be open to inference and construction, according to the circumstances of each case as proved; for the statute does not say precisely what is an overt act, but it says, to compass the death of the king is treason, if accompanied by some overt act. The mere compassing or imagining the death of the king, so long as it remains an act of the mind only, cannot be reached by proof, and is not a proper subject of trial; but if it be manifested by a positive act, such as conspiring, plotting, forming plans, or providing arms, &c. these are circumstances capable of proof, and we must accordingly inquire into the nature of such circumstances, and see whether they do or do not

[2] Webster's *New International Dictionary* (2nd ed.) defines the verb "manifest" as follows: "To show plainly; to make to appear distinctly; to put beyond question or doubt; to display; exhibit; reveal; prove; evince; evidence."

> amount to that which in the construction of the statute has been held sufficient as an overt act, to prove this branch of treason, although the design may not have been carried into full effect. * * *"

And Lord Chief Justice Eyre, summing up to the jury in *Rex* v. *Crossfield* [1796] 26 How. St. Tr. 1, at 190:

> "* * * This indictment states, as by the law it must do, these leading facts which are the evidence of that compassing and imagining, and in the language of the law are called the overt acts: that is, the acts by which the secret intention is made manifest. * * *"

And Lord Ellenborough, addressing the Grand Jury in *Rex* v. *Despard*, [1803] 28 How. St. Tr. 345, at 349, 350:

> "I have already stated to you, that such acts as sufficiently indicate an intention to commit any particular species of treason, and conduce to its execution, are properly overt acts of high treason."

And in summing up to the jury in the same case, Lord Ellenborough defined overt acts, at 487, as:

> "* * * certain open deeds of the party, done in prosecution of the treasonable purposes imputed to him, and manifesting the existence of such purposes."

And Lord Chief Justice Abbott, charging the Grand Jury in *Rex* v. *Thistlewood*, [1820] 33 How. St. Tr. 682 at 685:

> "I have already intimated, that any act manifesting the criminal intention, and tending towards the accomplishment of the criminal object is, in the language of the law, an *overt* act."

That it was the law of England that only those overt acts were sufficient which manifested treason is evidenced further by statements of prosecuting attorneys (who may be presumed to have stated the law in terms most favorable to prosecution) in their openings to the jury.

Thus in *Rex* v. *De La Motte*, [1781] 21 How. St. Tr. 687, Attorney-General Wallace stated to the jury, at 717, that

> "Any measures actually taken, which manifest a traitorous intention, are overt acts of treason."

And in *Rex* v. *Watt*, *supra*, at 1194, Mr. Anstruther, Counsel for the Crown, stated:

> "I have stated to you, that an overt act is the means used to effectuate the purpose of the mind. I have stated to you, that any means used to an end which has an apparent tendency to put the king's life in danger is an overt act of high treason. * * *"

And in *Rex* v. *Henry and John Sheares*, [1798] 27 How. St. Tr. 255, at 294, Attorney-General Toler summed up to the jury, in part, as follows:

> "First as to that count of compassing and imagining the death of the king—According to the law which I have stated, and adjudged cases, in the construction thereof, the crime of compassing and imagining becomes complete, so soon as the wicked imagination is acted upon by acts of open deed manifesting obviously the intention of the actor. From that moment, the intention so manifested is the completion of the crime. And in considering the ground upon which you shall regulate yourselves in the application of the evidence adduced, you will be kind enough to keep in your mind, first the fact, which is to be demonstrative of the intention, and then consider the relation of that (when proved), to the design charged against the prisoner."

In deciding that the overt act need not of itself manifest treason but might be an innocent act, the Circuit Court relied heavily (R. 482) on the so-called Lord Preston's case (*Rex* v. *Sir Richard Grahme*, [1691] 12 How. St. Tr. 646). In this case it appeared that one Ashton and others had hired a boat to take a party from England to France, England being at war with France at the time. This party,

which included Lord Preston, then hired a sculler to take them by wherry from the shore to the boat. Shortly after 11 o'clock at night, the party boarded the wherry at Surrey-Stairs, which was in the County of Middlesex, and were rowed out to the boat, which was apparently located within the County of Surrey. The party then set sail, but were apprehended when the boat was within the jurisdiction of the County of Kent. Papers were discovered,[3] some of them bearing Lord Preston's seal and in his handwriting, informing the French how they best could invade England, said documents containing not only information concerning the fortifications of English harbors, but also advice as to the treatment of the English on the invasion.

The indictment laid treason in the County of Middlesex, and on his trial Lord Preston urged that no overt act of treason had been proved in the said County. But Lord Chief Justice Holt rejected the contention, and in summing up to the jury spoke as follows, at 740:

> "Ay, but gentlemen, give me leave to tell you, if you are satisfied upon this evidence that my lord was privy to this design, contained in these papers, and was going with them into France, there to excite an invasion of the kingdom, to depose the king and queen and make use of the papers to that end, then every step he took in order to it, is high treason, wherever he went; his taking water at Surrey stairs in the county of Middlesex, will be as much high treason, as the going a shipboard in Surrey, or being found on ship-board in Kent, where the papers were taken."

What Lord Chief Justice Holt says in effect is that once there is found a clear overt act of treason (carrying papers

[3] There are several references to Lord Preston's case in Foster's *Crown Cases* (1809 ed.) a leading treatise on the subject of treason. He states (p. 198), "The papers found in Lord Preston's custody, those found where Mr. Layer had lodged them, the intercepted letters of Dr. Hensey, were all read in evidence as overt acts of treason respectively charged on them; and William Gregg's intercepted letter might, in like manner, have been read in evidence, if he had put himself upon his trial." See, also, p. 196.

into France to incite an invasion of England), then any step taken in preparation for that act is itself an overt act of treason. And this is the interpretation and significance which Holdsworth gives to the case:

> "It comes to this—every act, however remotely connected with an overt act of compassing the king's death, is itself an overt act." Holdsworth, *History of English Law*, Vol. 8, p. 317.

Holdsworth treats *Lord Preston's* case under the heading "Constructive Treason"; and that Lord Chief Justice Holt's ruling extended the law of treason is evident when that ruling is compared to the Solicitor General's opening to the jury in that case.[4]

But be that as it may, there is nothing in Lord Chief Justice Holt's ruling which weakens petitioner's argument in this case. Lord Chief Justice Holt's ruling at least required that one clear overt act be proved before any other alleged overt act, innocent in itself, could be considered by the jury. Here petitioner contends that all the overt acts submitted to the jury were insufficient; and even if one or two of the three alleged were sufficient, there is nothing in the jury's verdict to indicate that it found that said particular sufficient overt act or acts were proved.

The Circuit Court also relied on the case of *Rex* v. *Lynch* [1903], 20 Cox C. C. 468, in support of the proposition that the overt act need not manifest the treason. In that case one of the overt acts alleged (and the one on which the Circuit Court commented) was that while England was at war with the Government of the South African Republic the defendant took an oath of allegiance to said Republic. We submit that this overt act clearly manifests the treason of adhering to enemies. The only question discussed by

[4] "Treason, gentlemen, consists in the imagination of the heart; but because that imagination of the heart can be discovered no other way but by some open act, therefore the law doth require, that some overt act, manifesting that intention, be assigned and proved. * * *" (At p. 678).

the Court in that case was whether by virtue of the Naturalization Act of 1870 the defendant had ceased to be an English subject at the time he took the oath of allegiance to the Government of the South African Republic.

Nor do the other English cases referred to by the Circuit Court in its opinion appear to sustain the rulings of the District Court herein. Indeed, they conform to the familiar pattern of the English law above referred to which requires that the overt act shall in and of itself manifest treason. Thus, in *Rex* v. *Vaughan* [1696], 2 Salk. 634, 91 Eng. Rep. 535, 13 How. St. Tr. 485, the defendant had actually seized and was using the English vessel Loyal Clencarty in the service of the King of France. The Circuit Court (R. 482) refers to this overt act as "merely by cruising on the high seas for the French King." But here, as in the case of Lord Preston and in the case of *Rex* v. *Lynch*, just referred to above, the act would seem plainly to manifest treason.

The *Case of Hugh Pine* [1628], Cro. Car. 117, 1 Hale P. C. 118, 79 Eng. Rep. 703, the Court merely repeats the rule well established in early English law that mere words "not relative to any act or design" do not amount to treason. Had the words in *The Case of Hugh Pine* related to some conspiracy or plot to kill the King, as in the next case cited by the Circuit Court (R. 483) *Rex* v. *Charnock* [1695], 2 Salk. 631, 91 Eng. Rep. 533, there would again have been an overt act of manifest treason.

The final English authority cited by the Circuit Court is *Rex* v. *Casement* [1917], 1 K. B. 98, 86 L. J. K. B. 467. A mere reading of the report indicates on its face that the overt acts charged were all of such a character as, in and of themselves, to import a treasonable purpose and the very sentence quoted by the Circuit Court (R. 483) sustains the view for which we contend. That sentence reads: "Overt

acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object.": *Trial of Sir Roger Casement* (1917, ed. by Knott, p. 183).

THE AMERICAN AUTHORITIES.

The decisions of the Courts of the United States seem on the whole to conform to the general rule laid down in England that the overt act to be sufficient must of itself manifest treason.

That this was the view of Judge Learned Hand is apparent from his opinion in *United States* v. *Robinson*, 259 F. 685 (D. C., S. D. N. Y., 1919), where he pronounced the following dictum at page 690:

> "Nevertheless a question may indeed be raised whether the prosecution may lay as an overt act a step taken in execution of the traitorous design, innocent in itself, and getting its treasonable character only from some covert and undeclared intent. It is true that in prosecutions for conspiracy under our federal statute it is well settled that any step in performance of the conspiracy is enough, though it is innocent except for its relation to the agreement. I doubt very much whether that rule has any application to the case of treason, where the requirement affected the character of the pleading and proof, rather than accorded a season of repentance before the crime should be complete. Lord Reading in his charge in Casement's Case uses language which accords with my understanding:
>
> 'Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled.'
>
> Therefore I have the gravest doubt of the sufficiency of the first and second overt acts of the first count and of those of the second count, which consist of acts that do not openly manifest any treason. Their traitor-

ous character depends upon a covert design, and as such it is difficult for me to see how they can conform to the requirement."

And in *United States* v. *Leiner* (Appendix), the Court directed a verdict for the defendant, indicted for treason, for the reason, in part, that the overt acts as proved (which in substance were the same as involved in our case, namely, meeting with Kerling, falsehoods told to the F. B. I. for the alleged purpose of concealing the identity and mission of Thiel and Kerling) did not of themselves manifest treason. In this connection the Court stated (Appendix, pp. 47-8):

> "After reading all the American cases, which are not too many, it is, in my opinion, not going too far to say that under the law of treason a jury is not to engage itself in making inferences at all but only to decide on the credibility of the two witnesses who must prove the commission of each overt act or each part of an act consisting of parts. As one Judge said, the constitutional and statutory requirement of an overt act is intended to exclude the possibility of conviction for the odious crime of treason upon proof of facts which were treasonable only by construction or inference or which have no better foundation than mere inference. Other testimony is admitted to confirm the intent that must initially be evidenced by the very nature of the overt act in order to remove a reasonable doubt from the mind of the juror but not for any other reason."

See also *Charge to the Grand Jury*, 30 Fed. Cas. 1036 (C. C., S. D. Ohio, 1861), at 1037:

> "it has been already noticed, that to justify a conviction for treason, unless the crime is confessed in open court, there must be the evidence of two witnesses to an overt act. The plain meaning of the words 'overt act', as used in the constitution and the statute, is an act of a character susceptible of clear proof, and not resting in mere inference or conjecture. *They were*

intended to exclude the possibility of a conviction of the odious crime of treason, upon proof of facts which were only treasonable by construction or inference, or which have no better foundation than mere suspicion. In its benign caution on this subject, the law requires not only proof of a treasonable act, but that it should be established by the oaths of two witnesses. Hence, it will be obvious that however strong may be the grounds of suspicion or belief, that an individual is disloyal to his country or his government, until his disloyalty is developed by some open and provable act, he is not legally guilty of the crime of treason. And it follows, also, that mere expressions of opinion indicative of sympathy with the public enemy, will not ordinarily involve the legal guilt of that crime. They may well justify a strong feeling of indignation against the individual, and the suspicion that he is, at heart, a traitor, but will not be a sufficient basis for his conviction in a court of law. * * *" (Italics supplied.)

The only American cases cited by the Circuit Court are to be found at pp. 4835 of the Record. The report of

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In many States, before self-defense can be raised as a defense to a charge of murder, it is required that there be shown some "overt act" on the part of the deceased. In such cases the overt act is generally defined as follows:

"An overt act is a hostile demonstration of such character as to create in the mind of a reasonable person the belief that he is in immediate danger of losing his life or of suffering great bodily harm. The term 'overt act' as used in connection with prosecutions where the plea of self-defense is involved, means any act of the deceased which manifests to the mind of a reasonable person a present intention on his part to kill defendant or do him great bodily harm." *State* v. *Stragnet*, 190 La. 457, 470, 471, 482 So. 571, 575 (1938).

See also, *Cooke* v. *State*, 18 Ala. App. 416, 93 So. 86, at 88 (1921); *State* v. *Lehman*, 44 N. D. 522, 175 N. W. 736, at 740 (1919); *Johnson* v. *State*, 125 Tenn. 420, 143 S. W. 1134, at 1137 (1912).

In New York an overt act is required for conviction for attempt to commit a crime. (*Penal Law*, § 2) In this connection an overt act has been thus defined: "An overt act is one done to carry out the intention, and it must be such as would naturally effect that result, unless prevented by some extraneous cause." *People* v. *Mills*, 178 N. Y. 274, at 284, 285, 70 N. E. 786, 790 (1904).

United States v. *Fricke*, 259 Fed. 673 (D. C., S. D. N. Y., 1919) was the charge to the jury by Mayer, D. J., and it is in many respects at variance with the opinion of Judge Learned Hand in *United States* v. *Robinson*, *supra*. There is naturally no discussion or attempted analysis of the authorities.

The meager report in *United States* v. *Lee*, 26 Fed. Cas. 907 (C. C., D. C., 1814), which is the case involving the purchase of the watermelons, does not give a clear statement of the evidence, about which there seems to have been some dispute. It is far from clear that the Court held or intended to hold that the mere purchase of the watermelons, proved by two witnesses, could constitute an overt act in treason. This was another case in which the defendant was acquitted.

The other American cases cited in the opinion by the Circuit Court seem to cast little light on the subject.[6]

We have found no case, nor has any been cited, where

[6] The Circuit Court discusses (R. 483) the case of *Ex Parte Bollman*, 4 Cranch, 75, 8 U. S. 75, 2 L. Ed. 554, which involved the treason of levying war. It was there decided that before an accused could be convicted of the treason of levying war, it must be shown that there was an actual assemblage of men for the purpose of executing a treasonable design. Chief Justice Marshall explained the purpose of this requirement in *United States* v. *Burr*, 25 Fed Cas. No. 14693. (C. C. Va. 1807), as follows at 169:

> "Before leaving the opinion of the Supreme Court entirely, on the question of the nature of the assemblage which will constitute an act of levying war, this court cannot forbear to ask, why is an assemblage absolutely required? *Is it not to judge in some measure of the end by the proportion which the means bear to the end?* Why is it that a single armed individual entering a boat, and sailing down the Ohio for the avowed purpose of attacking New Orleans, could not be said to levy war? Is it not that he is apparently not in a condition to levy war?" (Italics supplied).

Thus in the case of the treason of levying war the actual assemblage must be shown to give credence to the alleged treasonable design of levying war. So also in the case of the treason of adhering to enemies, the overt act of itself must manifest treason to give credence to the existence of the alleged treasonable design of adhering to enemies.

a mere meeting with an enemy has been held to be a sufficient overt act of treason.

It was pressed upon the Circuit Court that the question now being argued must be deemed to have been disposed of by this Court by reason of its refusal to grant certiorari or rehearing in *Stephan* v. *United States*, 133 F(2d) 87 (C. C. A. 6th, 1943), certiorari denied—318 U. S. 781, 63 S. Ct. 858 (1943), rehearing denied 319 U. S. 783, 63 S. Ct. 1172 (1943), and the Circuit Court inclined to that view (R. 484).

A careful examination of the record of the trial in the *Stephan* case discloses that no motions whatever were made at the close of the case with respect to the several alleged overt acts. Had such motions been made as were made in the case now before the Court, it is fair to infer that many of the alleged overt acts would have been withdrawn from the consideration of the jury. In any event, some of the overt acts charged in the *Stephan* case were plainly sufficient, such as (5) which charged that Stephan "furnished, supplied and gave to said enemy, Peter Krug, food, drink and personal effects and clothing" to aid his concealment and escape and (13) that he had "supplied him with food and drink, and arranged, purchased and paid for transportation * * * from Detroit to Chicago." That Stephan with full knowledge of the fact that Peter Krug was an escaped German flyer, attempting to make his way back to Germany, gave him every sort of aid and comfort that could be of any avail under the circumstances was established by overwhelming evidence and was not contradicted by any proof to the contrary.

II.

We urge certain additional considerations in support of the contention that the proof in support of Overt Act 10 failed openly to manifest treason and was legally insufficient.

Petitioner was taken into custody about 10:50 p. m. on June 27, 1942 (R. 69, 105) by F. B. I. Agents Willis, MacInnes and Duncan at the Kolping House, 165 East 88th Street, New York City. From the Kolping House petitioner was taken directly to the New York office of the F. B. I., which is located in the United States Court House in New York City, arriving there at 11:20 p. m. (R. 105-106, 291). Sometime between 11:20 p. m. and 2 a. m. of the following morning petitioner made the statements on which Overt Act 10 is based (R. 106-12, 121).

Thiel was arrested by agents Donegan, Drayton and Foster at about 11:45 on the evening of June 23, 1942 (R. 86). Accordingly, when the statements alleged in Overt Act 10 were made by petitioner, the person whom he was alleged to have intended to give aid and comfort was already under arrest. For whatever bearing the circumstance may have upon petitioner's state of mind, his testimony was that on the evening before he was himself arrested "the thought definitely occurred to me, perhaps Thiel is arrested." (R. 286). The Government made no attempt to plead or prove that petitioner knew or had reason to believe that Thiel had not yet been apprehended at the time these statements were made.

The English authorities abound with general statements that mere words may not ordinarily constitute an overt act in treason. And there is something seemingly incongruous in holding that this heinous crime, punishable by death, may be committed by a person already in the custody of the law where common experience teaches that in the fear and excitement attendant upon the arrest many people make false statements with a vague idea that in some way they may extricate themselves.

The course of the interview was substantially this: At first Special Agent Willis asked petitioner who was the man he had been with on the evening of June 23rd and peti

tioner said his name was William Thomas and that this William Thomas had gone to the west coast to take a job in a factory in March of 1941 and had not been out of the United States (R. 106). It was then made apparent to petitioner that the F. B. I. men knew the identity of Werner Thiel and petitioner promptly admitted that the man was in fact Werner Thiel and said that Thiel was using the alias of William Thomas because of difficulty with the draft board (R. 106). He still stuck to his statement that this man had not been out of the United States (R. 107) and he further stated that the money belt given him by Thiel contained only $200; that there was about $3,500 in the safe deposit box which petitioner claimed belonged to him (R. 107-108). He finally asked Special Agent Willis to withdraw so that he could speak to Special Agent Ostholthoff alone when he admitted that all the money had been in the belt given him by Thiel with sundry other details (R. 109ff). After his conversation alone with Ostholthoff, he told Special Agent Willis that he had made the false statements at first to protect Werner Thiel "because Werner Thiel was his friend." (R. 108).

Substantially similar statements had been made by Lehner, who was also indicted for treason and whose trial, in the United States District Court of the Southern District of New York, on that charge before Hon. John W. Clancy and a jury was had shortly after the conviction of petitioner. In directing a verdict for the defendant in the *Lehner* case, Clancy, D. J., made the following comment concerning Overt Act 7 in that case (Appendix, pp. 47-9):

> "I am convinced that misstatements by a prisoner to his captors can constitute an overt act of treason only when there is pleaded and proved as necessary concomitant conditions that the prisoner knew or had reason to believe that the enemy alleged to be adhered to had not yet been apprehended and that the misstatements are such that their obvious result would be to

avert the enemy's apprehension or aid his depredations, and further, such as could not exculpate the prisoner.".

The danger of injustice in basing overt acts of treason on oral statements made by the accused after his arrest is a real one. Particularly in the case of people of humble origin, such as petitioner, it is almost inevitable that some false statements of fact will be made, at least in the beginning when the state of mind of the accused is in turmoil and distress. Almost anything said under these circumstances could be later construed as possibly giving some aid and comfort to an enemy.

THIRD POINT

Overt Act 10 should not have been submitted to the jury for the additional reason that petitioner's statements, which form the substance of that Act, were made by him subsequent to the time he was taken into custody but prior to the time of his arraignment.

This is a new point now raised for the first time in this Court in this case.

McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 579 (1943), was decided March 1, 1943, and sentence was imposed upon petitioner herein December 2, 1942 (R. 449). No objection was made to the testimony of the F. B. I. men upon the ground that their evidence in support of Overt Act 10, as charged in the indictment, was inadmissible. Separate motions were made, however, to withdraw from the consideration of the jury each and every one of the overt acts, other than those already withdrawn by the Government, and such a motion was specifically addressed to Overt Act 10 (R. 871). It was claimed that the evidence was insufficient to warrant the submission of any one of the overt acts to the jury and appropriate exceptions were taken to the denial of the motions and to the charge as well, in this respect.

The evidence already adverted to establishes that petitioner was taken directly from the place of arrest to the F. B. I. Room in the United States Court House in New York City where he was questioned between 11:20 P. M. and 2 A. M. of the following morning.

He was arraigned on this treason charge on August 31, 1942 (R. 1). While the record does not indicate any prior arraignment, the dates in the indictment (R. 1) would seem to suggest that petitioner was arraigned on July 17, 1942. In any event, the testimony of Special Agent Willis (R. 1056), as to the sequence of events immediately following petitioner's arrest, makes it abundantly plain that petitioner was not "immediately taken before a committing officer," or "the nearest United States Commissioner or the nearest judicial officer having jurisdiction," and that the statements alleged to constitute Overt Act 10 were made after arrest and prior to arraignment.

There appears to have been no violence or intimidation whatsoever by any of the Government Agents and the statements made were voluntary in character. Petitioner made no claim at any time to the contrary nor did he claim that the Government Agents treated him in anything other than a courteous and proper way at all times.

The fact remains, however, that petitioner is a person of humble origin and occupation and that his command of the English language is none too good. That petitioner had no realization whatever that any serious charge would be preferred against him seems clear; and his chief concern was about the $200 which had been given to him by Thiel in repayment of his indebtedness (R. 134-135).

18 *U. S. C.* § 595 provides as follows:

> "*Persons arrested taken before nearest officer for hearing.* It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the

nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof."

5 *U. S. C.* § 300a provides as follows:

"*Federal Bureau of Investigation; authority of officers to serve warrants and make arrests; authority to carry arms*

The Director, Assistant Directors, agents, and inspectors of the Federal Bureau of Investigation of the Department of Justice are empowered to serve warrants and subpoenas issued under the authority of the United States; to make seizures under warrant for violation of the laws of the United States; to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer. Such members of the Federal Bureau of Investigation of the Department of Justice are authorized and empowered to carry firearms."

Had petitioner been arraigned as required by law and advised of his legal rights, it is extremely unlikely that he would have made the false statements which form the substance of Overt Act 10.

Petitioner was born October 5, 1900, in Germany in the small farming community of Ollendorf in Westphalia (R. 218). His formal education was limited to elementary

school in Ollendorf and a course in a school of forestry and agriculture in Muenster, which he finished at the age of 17 (R. 219-220). He arrived in this country on July 27, 1925 (Govt's. Exh. 37, R. 55). He did not then understand English (R. 243). He has had no formal education in this country, although he did study books at home in order to prepare for an engineer's license, enabling him to work in a boiler room (R. 233-234). He was constantly trying to improve his command of English, as is evidenced by a well worn booklet entitled "How to Improve your English" found on his person at the time of his arrest (R. 243).

It may be that this Court will feel that this evidence given immediately after his arrest and prior to his arraignment, should not have been admitted against petitioner, or that it should not be admitted in the event of a new trial. As counsel did not have this point in mind at the time of the trial, the *McNabb* case not having as yet been decided by this Court, the evidence is necessarily somewhat incomplete and obscure. No specific questions relative to the time of arraignment were addressed to any of the F. B. I. men and we infer that this is what is meant by the statement in the foot note to the opinion of the Circuit Court (R. 480). It is reasonably to be inferred, however, from the testimony of Special Agent Willis, above referred to, that the statements alleged to constitute Overt Act 10 were made prior to arraignment. In other words, petitioner was arrested at the Kolping House, 165 East 88th Street, New York City, at about 10:50 P. M. (R. 69, 105) and taken to the New York office of the F. B. I. in the United States Court House in Foley Square, New York City, arriving there at 11:20 P. M. (R. 105, 106, 291); and the statements alleged in Overt Act 10 were made between 11:20 P. M. and 2 A. M. of the following morning (R. 106-12, 121). There was just barely sufficient time between 10:50 and 11:20 P. M. to transport petitioner from the place of arrest to the Court House. It seems evident that there was no arraignment as required

by law in this brief interval of time. Nor is there any reference to any such waivers as were signed by defendants in *United States* v. *Haupt*, 136 F. (2d) 661 (C. C. A. 7th, 1943). The situation is not unlike that developed generally in the *Haupt* case, due to the fact that the *McNabb* case was decided later. In any event, we think it our duty to bring the point to the attention of this Court, which has the power to notice error in the trial of a criminal case although the question was not properly raised at the trial. *Wiborg* v. *United States*, 163 U. S. 632, 16 S. Ct. 1127, 41 L. Ed. 289 (1896), *Crawford* v. *United States*, 212 U. S. 183, 29 S. Ct. 260, 53 L. Ed. 465 (1909).

If this evidence should have been excluded because of the failure on the part of the F. B. I. men to observe the terms of the statute requiring that the accused be arraigned immediately after his arrest, it would seem to follow that the testimony of the two witnesses to Overt Act 10 was in its entirety incompetent, inadmissible and illegal, even though no objection was raised on that ground. It was accordingly error to have submitted Overt Act 10 to the jury.

An entirely separate question of even more fundamental import is likewise presented. How can a statement procured by Government Agents by illegal means constitute an overt act of treason?

FOURTH POINT.

(A) The Court below erred in submitting to the jury Overt Acts 2 and 10 on the further ground that the allegations thereof had not been proved by the testimony of two witnesses; (B) and the Court erred in charging the jury with respect to the requirement of proof by two witnesses to each overt act.

Point (A) was raised by counsel for the petitioner on motion to direct a verdict at the close of the entire case (R.

370-371). With respect to Point (B), the Court charged the jury as follows (R. 442):

> "The Constitution of the United States provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act. This means that the Government must prove at least one of the three overt acts charged in the indictment by the testimony of two witnesses. These witnesses must be direct witnesses to the overt act. Where the overt act is of a type which is separable into parts, that is, a continuance and composite act made up of several circumstances and passing through several stages, there must be two direct witnesses to each part of the act, but they need not be the same two witnesses who testified to other parts of the act, so long as each part of the overt act is supported by the testimony of two witnesses."

And counsel for the petitioner excepted to the foregoing portion of the charge (R. 446-447).

Overt Act 2 consists of two meetings between petitioner and Thiel, one at the Twin Oaks Inn, the other at Thompson's Cafeteria. The meeting at Twin Oaks Inn was testified to by Agents Rice (R. 80-81) and Willis (R. 101-102). The meeting at Thompson's Cafeteria was testified to by Agents Rice (R. 81) and Stanley (R. 84).

The Constitutional requirement is that there be two witnesses to the same overt act. It is our contention that this means that there must be two witnesses to the *whole* overt act. It is apparent that there were not two witnesses to the *whole* overt act, in the sense that the whole overt act consisted of two conferences.

In *United States v. Robinson, supra*, the question arose whether it was enough to prove one element of the overt act by one witness, and another by another. Judge Learned Hand concluded that it was not, and stated at 694:

> "I conclude, therefore, that it is necessary to produce two direct witnesses to the whole overt act. It may be possible to piece bits together of the overt act,

but, if so, each bit must have the support of two oaths; on that I say nothing."

The rule is so stated by Wigmore, *Evidence* (3rd Ed.), § 2038:

"(4) Each of the witnesses must testify to the *whole* of the overt act or, if it is separable, there must be two witnesses to each part of the overt act. The rule seems not to have suffered any dilution like that which occurred to the perjury rule."

The point here raised was decided against petitioner by the Circuit Court on the ground that:

"If the policy behind the two-witness rule is to protect the accused fully against conviction upon the false testimony of one hostile witness, certainly this multiplication of witnesses will still better insure the result" (R. 486).

But it is important not only that there be two or more witnesses, but also that there be two witnesses testifying to the *same* overt act. Overt Act 2 is a single overt act. As the accused's guilt depends on the happening of Overt Act 2 *in toto*, it is no protection to him that two witnesses testify to each of its parts, but no two to the act as a whole.

That it was the intention of the framers of the Constitution to provide for a strict rule of proof with respect to overt acts cannot be doubted in view of their rejection of the provision of the then current English statute, 7 William III, to the effect that the accused could be convicted on the testimony of two witnesses to the same overt act, or one to one and another to another.

There was testimony to the following part of Overt Act 10 by one witness only, Agent Willis (R. 108):

"and was kept by him in a safe deposit box because he considered it safer there than in his savings account in said bank."

The Circuit Court held that this part of Overt Act 10 could now be regarded as mere surplusage in view of the other proved allegations. The Court further stated that the jury could not conceivably have relied on it solely to establish the act, for it presupposed petitioner's claim of ownership, which was in fact proved by two witnesses. It is submitted that the part of Overt Act 10 in question does not presuppose petitioner's claim of ownership inasmuch as one can readily keep other people's money in one's safety deposit box or savings account. But even if it did presuppose the claim of ownership, it is extremely doubtful whether the claim of ownership to the $3,500 would have in itself been a sufficient overt act of treason to submit to the jury. The mere fact that the other statements mentioned in Overt Act 10 were testified to by two witnesses is not decisive since the witnesses must be believed by the jury.

Furthermore, the jury was allowed to consider that part of Overt Act 10 in question as an overt act, that is, as an act particularly demonstrative of intention. And since it was defective as an overt act the jury may have given it undue weight in determining the crucial question of traitorous intention.

FIFTH POINT.

The evidence as a whole failed to make out a case against petitioner and the motion for the direction of a verdict in his favor should have been granted.

Exception was noted to the refusal to grant petitioner's motion for a directed verdict (R. 370). In view of the discussion of the allegations and the proof already set forth, any elaboration of this point would be mere repetition.

Conclusion.

The Judgment Appealed from Should Be Reversed and the Indictment Dismissed or, in the Alternative, a New Trial Ordered.

Dated: New York, February 16, 1944.

Respectfully submitted,

HAROLD R. MEDINA,
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JOHN McKIM MINTON, JR.,
RICHARD T. DAVIS,
Of Counsel.

APPENDIX.

United States v. Helmut Leiner.

Mr. Oberwager: If your Honor please, I rest, and with your Honor's permission I renew the motion that your Honor direct the jury to find a verdict in favor of the defendant dismissing the indictment and the charges therein.

(The jury returned to the courtroom).

The Court: The motion to direct a verdict must be granted. All of the law of treason is well settled and is stated in *U. S. v. Robinson*, 250 Fed. 685. That decision adopts as a definition of the overt acts required by the Constitution such an act as "manifests a criminal intention and tends towards the accomplishment of the criminal object. One by which the purpose is manifested and the means by which it is intended to be fulfilled." This definition is found in all the American cases without exception and was charged in this Court by Judge Goddard two weeks ago.

The third of the overt acts pleaded is not proved. There is no evidence in the case that Leiner conferred, treated and counselled with Kerling at the Crossroads Cafe, the evidence being affirmatively to the contrary; that what they did in there was not observed.

None of the others of the first six overt acts proved in this case meets the definition. None of them manifests or utters a treasonable purpose. None of them tends on the evidence to accomplish the criminal object. The defendant's extra judicial confession is admissible only for the purpose of corroborating the intent evidenced by an overt act already proved by the testimony of two witnesses. Since no treasonable intent appears from any of the six acts first stated in the indictment, the confession must be stricken out for all purposes excepting only the purpose of establishing the fact which is pleaded as a seventh overt act, and to which I shall advert.

After reading all the American cases, which are not too many, it is, in my opinion, not going too far to say that under the law of treason a jury is not to engage itself in making inferences at all but only to decide on the credibility

of the two witnesses who must prove the commission of each overt act or each part of an act consisting of parts. As one Judge said, the constitutional and statutory requirement of an overt act is intended to exclude the possibility of conviction for the odious crime of treason upon proof of facts which were treasonable only by construction or inference or which have no better foundation than mere inference. Other testimony is admitted to confirm the intent that must initially be evidenced by the very nature of the overt act in order to remove a reasonable doubt from the mind of the juror but not for any other reason.

Coming now to the seventh and last overt act pleaded in this case, it was alleged and proved that the defendant told three falsehoods to agents of the F. B. I. These falsehoods are that Kerling did not tell the defendant that Kerling had come here in a submarine; that Kerling never transferred any money to him; and that he had gone to a beer hall when, in fact, he had gone to look up Cramer. It is alleged that these falsehoods were given for the purpose of concealing the identity and mission of Kerling and Thiel which, in my opinion, they could not do at all. And it is only after that assumption is adopted that the acts, namely, the false statements conceal the identity and mission of Kerling and Thiel that they are pleaded as acts that involve any intent to aid Kerling. But this objection I would pass for maybe it is debatable. I am convinced that misstatements by a prisoner to his captors can constitute an overt act of treason only when there is pleaded and proved as necessary concomitant conditions that the prisoner knew or had reason to believe that the enemy alleged to be adhered to had not yet been apprehended and that the misstatements are such that their obvious result would be to avert the enemy's apprehension or aid his depredations, and further, such as could not exculpate the prisoner.

The substantial difficulty with the whole overt act is this: that no one can say definitely what the defendant's intention in telling these falsehoods was. Self-preservation is the first law of human nature and the least choice that would be given to a juror would be to determine whether the defendant, in making the false statements, was intending to cover himself or to cover Kerling and Thiel. While either

inference might be deemed reasonable, the decision that either was the actuating intent or even an intent in telling the falsehoods and committing the act, would be the merest speculation and no juror could make such determination without a reasonable doubt. The evidence, in other words, of this act is probative but too weak to satisfy the burden of proof beyond a reasonable doubt imposed upon the Government.

Under the Constitution and the law, I have no alternative except to grant the motion to direct a verdict, and I direct the foreman of the jury to return a verdict of not guilty which, according to my instructions, you do.

The Clerk: So do you all.

The Foreman: Yes.

The Court: I want to thank the jurors for their service and especially their willingness to serve in a case they knew was going to be trying.

The defendant is in the hands of the marshal and he may be disposed of in such manner as the Attorney General may direct that he should.